

***INDIA – MEASURES CONCERNING THE IMPORTATION
OF CERTAIN AGRICULTURAL PRODUCTS:
RECOURSE TO ARTICLE 22.6 OF THE DSU BY INDIA***

(DS430)

OPENING ORAL STATEMENT OF THE UNITED STATES OF AMERICA

November 30, 2017

1. Mr. Chairman, members of the Arbitrator, the United States thanks you, and the Secretariat Staff assisting you, for your ongoing work in this arbitration.

I. INTRODUCTION

2. At this point, a number of things are clear. India adopted a WTO-inconsistent ban on the import of U.S. poultry products, and both parties agree that the ban has caused actual nullification or impairment of the benefits to the United States under the covered agreements. Both India and the United States agree that the best way to measure that nullification or impairment is a partial equilibrium model that incorporates a price wedge to determine the net trade effect of India's import ban. Furthermore, leaving aside India's incorrect assertion that the European Union would export poultry to India if it were to remove its import ban, India's own values for the variables in the model result in a level of nullification or impairment of at least \$61 million, instead of the \$15 million noted in its written submission.

3. At the same time, the task of setting a level of suspension of concessions that is equivalent to the nullification or impairment caused by India's WTO-inconsistent import ban of U.S. poultry products is complicated by a number of factors, not the least of which is the lack of reliable data about the Indian poultry market, including the ambiguously defined "processed poultry" market, and other key variables, such as how Indian consumers would behave if they were to have the opportunity to purchase lower-cost U.S. chicken meat.

4. In its Methodology Paper, Written Submission, and Responses to Advanced Questions, the United States discussed at length its views on how to accomplish this task, and what data to rely on when making the calculations. Today, I will briefly summarize the U.S. position—including those places where we and India agree on how the Arbitrator should perform its calculations and data the Arbitrator should use—before addressing some issues raised in the advance questions from the Arbitrator and India's responses to those questions.

5. But before doing that, I would like to briefly discuss two key themes that are relevant to the Arbitrator's task, including all of the issues we will be discussing here today:

6. *First*, as just noted, the lack of readily available, reliable data on India's poultry market in general and for specific poultry products presents a challenge. The U.S. Department of Agriculture estimates total poultry consumption in India, and India does not dispute the accuracy of those estimates. But there is not much beyond that. Neither the Indian government nor any other organization keeps timely, reliable, accurate measures of the Indian poultry market, so it is difficult to estimate things such as the size or growth rate of the processed poultry market, or even the exact contours of that market.

7. The United States developed the most robust model it could to accurately calculate the level of nullification or impairment resulting from India's import ban. But the United States could not develop a model that incorporated additional variables because data for those variables were not available; in some instances the obstacle to developing a more robust model was the lack of trade brought about by the import ban itself. Given the data limitations, the United States

used a price wedge approach in a partial equilibrium model—widely used in the academic literature—to estimate the level of nullification or impairment.

8. The DSU does not require absolute precision in setting the level of nullification or impairment, only a “reasoned estimate” in the words of the *EC – Hormones* arbitrator. There is sufficient data that the Arbitrator can use the U.S. model to determine a reasoned estimate, but adding more variables to the model could require the Arbitrator to make additional assumptions, with little or no empirical data to support them, that would make the model’s results less reliable.

9. Importantly, sufficient data are necessary to reasonably quantify the effect of India’s import ban. At least two previous arbitrations have declined to incorporate whole categories of alleged harm into the nullification or impairment calculation, and there is no reason for you to deviate from those precedents here. As a result, it is necessary to be very cautious when considering incorporating into the analysis of the level of nullification or impairment analysis additional variables that have not been—and in many cases cannot be—quantified.

10. *Second*, it is important to remember that the U.S. methodology paper only evaluates the effect of India’s import ban on the sale of U.S. frozen chicken leg quarters, or CLQs, and not the total effect of the ban. India’s import ban affects *all* U.S. poultry products, including processed products that contain poultry. But, in part because of the data limitations just outlined, the United States calculates the level of nullification or impairment based only on the effect the import ban has on CLQs. And, again in part because of data limitations, the U.S. made many conservative assumptions about the trade effect that India’s ban had on CLQs.

11. As a result, any level of suspension of concessions set by reference to the U.S. model will be less—indeed, likely *substantially* less—than the actual level of nullification or impairment resulting from India’s import ban. India suggests that there is a risk that the Arbitrator could set the level of suspension of concessions higher than the level of nullification or impairment. But this risk is vanishingly small since the analysis is confined to the impact that imported CLQs would have on the processed poultry market. India is at best silent on this point, and at worst assumes that the *only* trade effect its ban has is on U.S. CLQs. But this is not the case, and it is important not to lose sight of this salient fact.

II. THE METHODOLOGY

12. The good news is that India and the United States agree on *how* the Arbitrator should determine the level of nullification or impairment resulting from India’s import ban.

13. Specifically, India and the United States agree that the Arbitrator should calculate the “price wedge,” which is how much higher the price of chicken is in India than the price that Indian consumers would pay for imported chicken from the United States if the ban were withdrawn. The Arbitrator can then use the price wedge in a partial equilibrium model to determine the volume of U.S. CLQs India would import if the ban were withdrawn.

14. This total amount of imports results from both the increase in demand from Indian consumers for lower-cost CLQs, and the decrease in supply provided by Indian poultry producers given the lower market price.
- a. The increase in demand is calculated by multiplying the price elasticity of demand by the level of consumption, and then multiplying that result by the percentage change in price once the price wedge is removed.
 - b. A similar calculation can be performed to determine the decrease in supply. Specifically, the price elasticity of supply is multiplied by the level of consumption and percentage change in price.

III. INPUTS

15. The parties also agree on some of the inputs to this model.
16. India and the United States agree that the Arbitrator can use the USDA estimate of the total size of the Indian poultry market in general.
17. India and the United States also agree that the wholesale leg price from the Murga Market in Delhi should be used as the Indian price, and U.S. Census price should be used as the U.S. price, for purposes of determining the price wedge.
18. India and the United States also agree that the price elasticity of supply in India is 1.
19. But the parties disagree on many of the other inputs into the model. The most important of these disagreements are on the size of the processed poultry market in India, the price demand elasticity Indian consumers would have for CLQs, and the transportation costs required to get frozen U.S. CLQs to India. On all three, India takes an incorrect position.
20. For most of the inputs on which we disagree, India supports its argument by reference to the same set of facts: namely, India's poor cold chain and infrastructure development, and a purported preference of Indian consumers for live birds slaughtered at a wet market. But these issues are irrelevant for two independent reasons.
21. *First*, the model already takes these issues into account by valuing the impact India's import ban has on the *processed* poultry market, rather than the poultry market as a whole. The processed market is dominated by quick service and institutional restaurants. These institutions generally use existing cold chain infrastructure, and cold chain infrastructure expands to meet the demands of these customers as they grow. Obviously, Indian consumers who eat processed chicken are consuming it despite its not having been slaughtered in front of them at a wet market, so these customers put aside any alleged preference for fresh chicken in favor of other advantages offered by processed chicken, such as low price or convenience.
22. *Second*, empirical evidence from other countries suggests that lack of cold chain infrastructure and live bird preference does not prevent consumers from buying imported frozen

CLQs when they are available. As discussed in the U.S. Written Submission and Exhibit US-41, consumers in Haiti and Cameroon purchased substantial quantities of imported chicken meat once restrictive tariffs were removed, *despite continuing to express a preference for fresh, local poultry*. These countries are much poorer than India in terms of per capita GDP and have much worse infrastructure according to the World Economic Forum. They also traditionally purchased chicken that was slaughtered at wet markets. Yet that did not stop them from purchasing imported frozen chicken once it was available, and there is no reason to believe that Indian consumers would behave differently when given a similar option to purchase low-cost U.S. CLQs.

23. It is also important to remember that the inputs used by the United States are conservative. The United States did not use the high-end estimate for the size of the processed poultry market, 20%, but rather took the midpoint of that and other studies that suggested the size is closer to 10%. Nor did the United States use the highest price elasticity of demand found in the literature, or the lowest shipping cost. The United States also makes conservative assumptions, such as 100% of India's tariff being passed on to consumers, even though that may not be the case. For example, the study of the US-China chicken trade in Exhibit US-58 found that only 77 to 83 percent of the tariff was passed on to consumers. Given how conservative these estimates are, there would be a risk of setting a level of suspension of concessions that is drastically lower than the actual nullification or impairment, even when just looking at the limited CLQ market, if these already conservative assumptions and estimates were further reduced.

A. Price Elasticity of Demand

24. The United States used a price elasticity of demand of negative 1.5 in its Methodology Paper. This value was taken from an analysis performed by the USDA in 2004. As described in the declaration of the primary author of that report, submitted as Exhibit US-59, the authors of that analysis derived the elasticity value by performing extensive field research, reviewing information obtained from interviews with industry participants in India, and analyzing a number of different data points, including a substantial increase of Indian poultry consumption combined with moderate price growth. One of the conclusions they reached was that the price demand elasticity of poultry in India was nearly twice as large as the price demand elasticity for the generic category of "meats" that had been previously estimated by an independent academic review.

25. The negative 1.5 value is further supported by subsequent econometric research, submitted as Exhibit US-47, that estimated a price demand elasticity in Indian urban areas of negative 1.37.

26. Indeed, the negative 1.5 value may be conservative. The study at Exhibit US-47 estimated that the urban price demand elasticity was as large as negative 3.64 in 2004—the same time period as the USDA study. A different study estimated the market demand elasticity for CLQs in China—a good proxy market for India—as high as negative 2.1. The mid-point of this study's estimates was negative 1.5, the exact value used by the United States.

27. India, by contrast, asserts that the price elasticity of demand is just negative 0.4. This is not supportable. Rather than finding a value in the academic literature, or performing an econometric analysis of its own poultry market, India retained a consultant who arbitrarily asserted the value and labeled it “reasonable.” India’s consultant, like India itself, cited no academic studies and performed no econometric analysis. None of India’s written submissions have engaged with the negative 1.37 estimate for the 2010 study, or the roughly negative 1.5 estimate from the study of China.

28. Perhaps recognizing the weakness of its position, India later asserted—again, without reference to anything at all—that “it is reasonable to rely on guestimates of the values of elasticities,” even going so far as to claim that those guestimates might be superior to empirical estimates. You do not need to be a professional economist to recognize just how flawed that statement is.

B. Market Size

29. As noted above, the United States calculated the level of nullification or impairment by estimating that the processed poultry market makes up 15% of the total poultry market in India. This estimate is the mid-point between the 20% estimate from Exhibit US-6 and the 10% estimate from Exhibit US-14. A number of other sources, quoted in both the Methodology Paper and U.S. Written Submission, estimate that U.S. CLQs will capture 15% or more of the Indian poultry market once the import ban is lifted. Again, this market size estimate is conservative; one commenter, quoted in Exhibit US-20, asserted that CLQs could capture up to 40% of *the entire Indian poultry market*.

30. The 15% estimate used by the United States is confirmed by exhibits submitted by India. Exhibit IND-13, written in 2012, estimates “the share of processed poultry to be mere 5 percent.” But it also estimated that the processed chicken market would “grow at a much stronger pace of more than 25%.” That 25% growth rate, along with the 5% growth estimate for the poultry market as a whole, means that, *per India’s own sources*, the processed poultry market was just under 12% of the overall poultry market in 2016, growing to 14.2% in 2017.

31. By contrast, India argues that processed chicken was just 5% of the Indian poultry market in 2016. But this claim is based on a single, unsupported source that cites no surveys, academic studies, or economic analyses that support its estimate; and India cites none either.

C. Shipping Costs

32. Shipping costs from the United States to India would be relatively low, at 8.5 cents per kilogram, including insurance. This figure is supported both by the publicly available website worldfreightrates.com and by actual rates paid by U.S. exports for shipping frozen animal products to Chinese Taipei.

33. It is important to remember that distance between origin and destination is not the sole factor in shipping costs. Two other key determinates are (1) whether the cargo must be routed

through an intermediate port—a process known as “transshipping;” and (2) whether the refrigerated containers used to ship the product to the destination port can be re-used for product leaving the destination port. If, consistent with the counterfactual, India is importing over 600,000 metric tons of CLQs from the United States, both of these factors would suggest relatively low shipping costs.

34. Transshipment increases transportation costs because the containers being transshipped must be unloaded from one vessel, stored, and then loaded on to a second vessel. Transshipment of perishable items such as CLQs is particularly difficult given that the refrigerated containers must be connected to a power source and constantly monitored to maintain refrigeration during storage.

35. While a number of factors affect whether goods are transshipped, an important one is volume. Many times goods are transshipped to allow carriers to consolidate a number of small loads into one large load and therefore maximize the volume of product being delivered to a given port. Here, if India is importing over 50,000 metric tons of CLQs each month, it is unlikely that those would be transshipped through an intermediate port, and, as a result, total transportation costs would be lowered.

36. Similarly, when transporting perishable goods in refrigerated containers, the ability to re-use that container at the destination port can lower the cost of transport by up to \$500 per container. Refrigerated containers are very expensive and typically cannot accommodate forklifts or other heavy devices as they could damage the unit, so they can be used only for perishable items, as opposed to general use. India is a leading exporter of bovine meat—shipping out over 1.2 million metric tons in 2016. It is highly likely that refrigerated containers bringing frozen U.S. CLQs into India could then be used to ship bovine meat out of India. This would lower shipping costs.

37. This is why the United States chose Chinese Taipei as a comparison market for shipping costs. Like India would without its ban, Chinese Taipei imports a substantial volume of frozen CLQs, facilitating direct shipments from the United States without the need to transship. And, like India, Chinese Taipei exports a substantial volume of perishable animal products and therefore can reuse the refrigerated containers that are used to ship U.S. CLQs.

38. India appears unable to decide on how to best calculate shipping costs from the United States to India. In its written submission India relied on a “matched pairs” analysis, that compared the reported value from the exporting country with the reported value from the importing country. The advance questions reflected that results from this method of analysis “are likely to be fraught with mismeasurement and statistical errors.” And in its written submission, the United States noted both the theoretical shortcomings of the matched pairs analysis, as well as the substantial issues in its application in this proceeding.

39. Perhaps because of these critiques, India has moved on to a new method. Rather than relying on a matched pairs analysis, it now argues that shipping costs should be estimated with reference to what appear to be an arbitrarily selected group of other countries that shipped

perishable animal products to the United States in 2015 and 2016. This new method drastically lowered India's estimate of shipping costs from fifty-three cents per kilogram, to between eighteen and twenty-five cents per kilogram. But even these new values are still too high. India's analysis does not take into account volume, or whether the products were transshipped, or distance, or whether the goods were being shipped to ports that also exported perishable items that needed to be refrigerated, or any other relevant variable. It can safely be disregarded.

IV. LEGAL ISSUES

40. The parties also disagree on two purely legal issues: (1) whether the Arbitrator can determine the level of suspension of concessions based on a formula as opposed to a fixed value; and (2) whether the reference period for determining the level of nullification or impairment should be calendar year 2016, or the twelve month period starting with the expiration of India's reasonable period of time to comply with the DSB's recommendation. India asserts positions are not supported by either the text of the DSU or any past arbitrator decision.

A. Proper Reference Period

41. The second of these—the proper reference period—is the easier to address. Quite simply, the DSU is silent about which period to use.

42. The DSU requires that the level of suspension of concessions be equivalent to the level of nullification or impairment resulting from the WTO-inconsistent measure. As previously noted, other arbitrators have stated that the level of nullification or impairment should be a “reasoned estimate,” one that is based “as much as possible, on credible, factual, and verifiable information.”¹ The United States chose calendar year 2016 as the reference period because data for that year were readily available.

43. India, continuing the trend of citing nothing in support of its positions, argues instead that the proper reference period should be July 2016 through June 2017. Not only does the DSU not mandate use of this reference period, mandating its use would be impossible given that the complaining party's request for authorization must be approved by the DSB within 30 days of the expiration of the reasonable period of time to comply, unless the Member concerned objects. As the arbitration may move forward immediately, which did not occur here simply because the United States continued to seek to resolve the dispute with India, it would be impossible for the DSU also to silently mandate a reference period for determining the level of nullification or impairment that is twelve months from the expiration of the RPT.

44. But, the DSU does not prohibit an arbitrator from using that reference period, given the time that has elapsed since India objected to the U.S. request. But, if July 2016 through June 2017 were used as the reference period, it would also be necessary to update *all* relevant data to

¹US – 1916 Act (EC) (Article 22.6 – US), para. 5.54.

reflect this new time period. As discussed in the U.S. Written Submission, doing so actually *increases* the level of nullification or impairment to **\$493.5 million.**

B. Use of a Formula

45. The other legal issue is whether the level of suspension of concessions can be determined by a formula, or must be a fixed, unchanging number. The DSU affords discretion to an arbitrator, requiring only equivalence between the level of suspension and the level of nullification or impairment. As discussed in its Written Submission and the Responses to Advanced Questions, in this proceeding determining the level of suspension of concessions through use of a formula will better maintain the required equivalence.

46. Suspension of concessions is intended to encourage India to bring its measure into compliance with the requirements of the SPS Agreement. Given the conservative estimates used in the model, and the expected rapid growth of the processed poultry market in India, the ability of the suspension of concessions to encourage India to comply with its obligations will substantially erode over time unless the suspension of concessions grows with the market.

47. The most recent set of advance questions asked whether the United States would object to, in essence, setting the level of nullification or impairment each year by re-running the model with updated data including, importantly, “the size of the Indian processed/frozen poultry market in year t.” While the United States does not object to this approach in theory, it would be difficult if not impossible to execute in practice. The largest obstacle to successfully executing this approach is the substantial challenges related to identifying the size of the Indian processed poultry market in a timely manner for a particular year. The United States is not aware of any source that would accurately analyze the size of that market in any given year.

48. But even aside from that issue, it is unclear what specific sources would be consulted when performing this calculation each year. For example, how would the “cost of transport” be determined? Would this require the United States to produce the actual transportation cost data on file with the U.S. Federal Maritime Commission? Or would some other source be used? Would U.S. Census statistics be used to determine the price of U.S. CLQs, or something else? Would the Murga Market price be used for Indian CLQs? Without more clarity around these sourcing questions, it is difficult to evaluate the feasibility and appropriateness of the Arbitrator’s proposal.

V. U.S. ABILITY TO MEET NEW IMPORT DEMAND

49. The advance questions asked whether the United States would provide all of the chicken demanded by Indian consumers at the lower price. For all of the reasons discussed in the U.S. response, the answer is yes. Only a handful of countries in the world have the production capacity to meet that demand, and none is price competitive with the United States.

50. India spends multiple pages of its response explaining how, *theoretically*, it would be possible for one or more countries to export poultry to India and compete with the United States.

But this theoretical possibility does not manifest itself in reality. Only a few countries are subject to India's import ban, yet India imports very little poultry. Brazil and Thailand, along with the United States, are the world leaders in poultry production. Brazil and Thailand have not reported outbreaks of high pathogenicity or low pathogenicity avian influenza in the past five years, so neither country was subject to India's import ban. Yet, neither country exported chicken to India during this time. Indeed, India cites a lack of exports from Brazil as proof that the level of nullification or impairment from its import ban is low. But, as explained in the U.S. responses, Brazil's exports are qualitatively different from those from the United States, so it is not surprising that India did not import Brazilian chicken.

51. The European Union also did not have any reportable avian influenza outbreaks during most of the time the ban has been in place, but only exported very little poultry—and no chicken—to India. Despite this, India argues, incorrectly, that the European Union would capture a significant portion of any increased demand. While this argument is clearly undermined by the fact that India did not import any EU chicken despite the EU not being subject to the import ban, it is also based on flawed data.

52. Specifically, India argues that the EU has a price advantage over the United States by comparing per unit cost of exports under HS code 020714. But this is comparing apples to oranges. A substantial portion of EU exports under code 020714 is mechanically deboned or mechanically separated meat. This is a byproduct of chicken processing and is used as an input for chicken products that are processed further. The United States reports this product under a different HS code. And, it is decidedly *not* a product that Indian consumers might purchase instead of U.S. CLQs. Therefore comparing the EU prices that include it to U.S. prices that do not is not helpful. If apples are compared to apples—that is, the per unit cost of chicken legs from the EU with the per unit cost of U.S. CLQs—CLQs have a clear price advantage, as shown in the U.S. responses.

VI. CONCLUSION

53. For the reasons discussed, as well as those explained in the Methodology Paper and U.S. Written Submission, the United States respectfully requests that you set the level of suspension of concessions using a formula that recognizes the strong growth of the level of nullification or impairment each year, based on a level of nullification or impairment for 2016 as no less than \$478 million.